BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of: Arizona Public Service Company Ocotillo Power Plant	))))))))	Appeal No. PSD 16-01 Maricopa County Air Quality Department PSD Permit No. PSD16-01

SIERRA CLUB REPLY BRIEF

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Pursuant to 40 C.F.R. § 124.19 and Section IV.D.6 of the Environmental Appeals Board ("EAB" or "Board") Practice Manual, Petitioner Sierra Club files this reply brief to correct errors of fact and law asserted in the response briefs of Maricopa County Air Quality Department (the "County" or "MCAQD"), and the project applicant, Arizona Public Service ("APS") (together "Respondents"). In light of the Boards presumption against reply briefs, Sierra Club limits this brief to only the issue of whether Sierra Club appropriately preserved its right to appeal the issues raised in its Petition in this proceeding. Sierra Club's silence in this brief on other issues raised in its petition does not constitute a waiver of those arguments.

I. INTRODUCTION

Sierra Club properly raised all of the issues addressed on appeal during the public comment period; therefore, Sierra Club's petition meets the threshold procedural requirements to petition for review of the County's final permit for the Ocotillo Power Plant. The Board should reject Respondents procedural arguments asserted in their briefs and address the merits of Sierra Club's petition.

There is no dispute that Sierra Club submitted detailed comments to the County on April 9, 2015 during the public comment period for the draft Prevention of Significant Deterioration ("PSD") permit for the Ocotillo Power Plant. However, both the County and APS argued in briefs submitted May 12, 2016 that Sierra Club waived its right to appeal the final PSD permit for the Ocotillo Power Plant because Sierra Club did not submit a second round of comments during the public comment period on a revised draft permit, which the Country initiated on December 11, 2015. (County Brief at 27-30; APS Brief at 8-13.)

Sierra Club acknowledges that it did not file an additional round of public comments during the additional public comment period on the revised draft permit, but a second round of

comments in the revised public comment period was not required for Sierra Club to preserve the issues it already raised during the initial public comment period. *See Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C.Cir.1998) ("The purpose of the exhaustion requirement is to ensure that the agency is given the first opportunity to bring its expertise to bear on the resolution of a challenge to a rule.") If nothing else, the County's response to comments ("RTC") (Pet. Ex. 2), which it sent out with the final permit notice on March 23, 2016, demonstrates that the County was fully aware of the issues raised by Sierra Club and had an opportunity to respond. *See Nat. Res. Def. Council v. E.P.A.*, 755 F.3d 1010, 1022 (D.C. Cir. 2014)(holding that issues addressed by the agency in response to comments were properly before the reviewing court).

Even if Sierra Club had been required to repeat the same arguments in a second round of comments, which it was not, good cause exists for the Board to consider the merits of Sierra Club's petition because the County failed to adequately notify Sierra Club that it had opened a second public comment period in December 2015.

II. SIERRA CLUB RAISED THE ISSUE OF ENERGY STORAGE PAIRED WITH STORAGE DURING THE PUBLIC COMMENT PERIOD

Sierra Club's petition asserted that the County failed to properly identify in step-1 of the best available control technology ("BACT") analysis whether the pairing of energy storage with combustion natural gas turbines was a potentially available and applicable technology. (Pet. at 11.) Sierra Club clearly and specifically raised this issue in its April 9, 2015 comments to the County. (Pet. at 29-31; Pet. Ex. 4, SC Comments at 6, 7, 11-16, 33.) The County was therefore fully aware of Sierra Club's concerns with respect to the Ocotillo Power Plant and had an opportunity both to respond to Sierra Club's comments and to address the deficiencies in the draft permit before it was finalized.

A petitioner appealing a PSD permit must demonstrate "that any issues being raised were raised during the public comment period." 40 C.F.R. 124.19(a). In order to demonstrate that an issue has been preserved for appeal, a petitioner must show that any issues being appealed were raised with reasonable specificity during the public comment period. *In Re Indeck-Elwood, LLC*, 13 E. A D. 126, 143 (EAB 2006); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230 (EAB 2000); *In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 548 (EAB 1999)). This requirement to raise issues during the public comment period is necessary for "[t]he effective, efficient and predictable administration of the permitting process" so that "the permit issuer be given the opportunity to address potential problems with draft permits before they become final." *In Re: Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999). "[T]he broad purpose behind the requirement of raising an issue during the public comment period is to alert the permit issuer to potential problems with a draft permit and to ensure that the permit issuer has an opportunity to address the problems before the permit becomes final." *In Re City of Phoenix, Arizona*, 9 E.A.D. 515, 526 (EAB 2000).

Sierra Club clearly raised the issue of energy storage paired with combustion turbines "during the public comment period." 40 C.F.R. § 124.19(a)(emphasis added). However, Respondents assert that Sierra Club nevertheless waived this issue because it did not repeat the same comments during the December 2015 public comment period on the revised draft permit. (County Brief at 27-30; APS Brief at 8-13.) Respondents' arguments distort both the practice and the purpose of the Board's procedural requirement to raise issues with reasonable specificity during the public comment period in order to preserve those issues for appeal, and as such those arguments must fail.

Sierra Club complied with the requirements of 40 CFR § 124.13, which state: "All persons, including applicants, who believe any condition of a draft permit is inappropriate…must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing)." Sierra Club's April 9, 2015 comments specifically criticized the GHG limit in condition 18 of the draft PSD permit because the County failed to consider, among other things, energy storage paired with combustion turbines as an available and applicable technology.

In the December 2015 revised draft permit, the County revised the GHG limit in condition 18 of the revised draft permit from 1,690 lbs CO_2/MWh to 1,460 lbs CO_2/MWh, but not for the reasons raised by Sierra Club and not in a manner that resolved Sierra Club's concerns. Instead, the County added a section to the technical support document ("TSD") that included a response, which in large part was supplied by the applicant, asserting that energy storage in all its applications would constitute a redefinition of the source. (Pet. Ex. 6, TSD at 33-34, 39; *see, also,* Pet. Ex. 5, Revised App. at PDF 124.) Notwithstanding this response, the County had clearly been alerted to the concerns raised by Sierra Club and had the opportunity to respond to Sierra Club's comments by either fixing the deficiencies in the draft permit or responding to Sierra Club's comments. The County declined to fix those problems in the permit, and instead issued a response to Sierra Club comments on March 23, 2016, after the public comment period for the revised draft permit had closed. At no time did Sierra Club waive or abandon its concerns with respect to the Ocotillo permit's GHG BACT analysis; therefore, the issues raised by Sierra Club in its April 9, 2015 comments are properly before the Board on this appeal to determine whether the County's actions were appropriate.

Respondents rely in large part on *In Re City of Phoenix, Arizona*, 9 E.A.D. 515 (EAB 2000) to support their arguments that Sierra Club somehow waived its right to appeal by not filing a second round of comments on the December 2015 revised draft permit. (County Brief at 17, APS Brief at 10, 13.) However, *City of Phoenix* is readily distinguishable from the facts in this proceeding. In that case, petitioners attempted to raise issues that had not been raised during the public comment period. The Board explained the "extensive informal exchanges of documents and information that occurred between the Petitioner and the Region prior to the formal solicitation of comments by the Region from the Petitioner and the other interested persons on the particular draft permits that, as proposed by the Region, eventually culminated in the final permit decisions currently under consideration." *Id.* at 518 (emphasis added). These exchanges began in 1990 and continued at various times for a period of seven years until the Region finally issued a formal notice opening public comment on July 28, 1997. *Id.* at 521. Notably, during the public comment period, the petitioner in that case, the City of Phoenix, submitted comments "stating therein that the proposed permits were acceptable…" *Id.* (emphasis added). The city later pushed for an evidentiary hearing, citing as a basis the informal comments that it made to the Region prior to the comment period. *Id.* at 527.

The EAB rejected the city's arguments on the grounds that it would make the permitting process unmanageable:

> In a case such as the one before us, where the administrative record is spread over a number of years, and is comprised of several permit iterations, many of which were never proposed for public comment, the task would necessarily involve a time-consuming and exhausting search of the administrative record, just to assure that all potential comments had been identified

Id. at 527.

In the present case regarding Ocotillo, the policy considerations at issue in *City of Phoenix* are not applicable. Unlike *City of Phoenix*, Sierra Club submitted comments during a formally noticed public comment period. Although Sierra Club informally corresponded with the County at various times to ascertain the status of the permitting process (*see* County Brief, Ex. 6), that informal correspondence did not form the basis of Sierra Club's appeal here. Moreover, Sierra Club never provided any indication to the County that the concerns it raised during the public comment period had somehow been resolved prior to the issuance the final permit.

Similarly, the County was not required "to divine, by means unknown, whether or not the comments were still being preserved of whether they had been resolved or abandoned by the commenter." *Id.* at 527. Unlike *City of Phoenix*, Sierra Club did not submit affirmative comments during the revised draft permit comment period stating that the Ocotillo plant's GHG limits were acceptable. To the contrary, as the County's Exhibit 6 points out, Sierra Club sent emails on August 13, September 22, and September 28, 2015 requesting updates as to the status of the pending permit and the County's response to comments. In fact, those are not the only emails. On November 9, 2015, Sierra Club sent another email requesting a status update on the Ocotillo process. (Sierra Club Reply Brief Ex. 3.) These repeated inquiries should have alerted the County that Sierra Club remained anxious about the Ocotillo project and had not "abandoned" its concerns. If nothing else, the County could have simply asked Sierra Club directly whether it was satisfied with the revised draft permit. Instead, as discussed in more detail below, the County reopened the comment period on the revised draft permit without notifying the Sierra Club attorney who had authored the April 9, 2015 comments and had corresponded with the County over a dozen times by email over the course of nearly two years requesting updates on the status of the permit.

The purpose of the public comment requirement is to alert the permit issuer to potential problems with draft permits before they become final so that the permit issuer has an opportunity to address before it is raised on appeal. *In Re: Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999); *In Re City of Phoenix, Arizona*, 9 E.A.D. 515, 526 (EAB 2000). Sierra Club's April 9, 2015 comments fulfilled that purpose, and therefore the Board should dismiss Respondents' procedural arguments and address the merits of Sierra Club's petition.[1]

III. THE COUNTY DID NOT PROVIDE APPROPRIATE NOTICE TO THE SIERRA CLUB THAT THE COMMENT PERIOD HAD BEEN REOPENED

As discussed above, Sierra Club was not required to repeat its arguments during the second public comment period in order to preserve those issues on appeal. However, even if Sierra Club had been required to submit additional comments, the Board should waive that requirement in this instance because the County failed to properly notify Sierra Club that the public comment period had been reopened.

The County asserted in its brief that it "delivered notice [of the revised draft permit comment period] to stakeholders, including Petitioner" and that it "gave Petitioner actual notice of…MCAQD's publication of the revised draft permit." (County Brief at 11, 24.) In fact, the County went so far as to claim that one of the purposes of the December 2015 comment period on the revised draft permit was to "provide Petitioner the opportunity to address the revisions." (*Id.* at 23.) If the County's purpose in extending the comment period was to solicit additional input from Sierra Club, it failed miserably.

Attachment 7 to the County's Brief is a copy of an email notice sent out on December 11, 2015 with the subject "Public Notice and Notice of Hearing." The County asserts that the notice

[1] Respondents' reliance on other cases is similarly unpersuasive. Those cases mostly involved instances where petitioners failed to raise comments during the public comment period or attempted to bring in new issues on appeal that were not raised with reasonable specificity during the public comment period.

"listed at least *two* Sierra Club email addresses…one [of which] may have been undeliverable." (County Brief at 11)(emphasis in original). As can be seen in Attachment 7, those addressees are Bruce Nilles and Derek Nelson. The County did not, however, include Travis Ritchie, the author of the April 9, 2015 comments (Pet. Ex. 4) and the person who had corresponded with the County by email over a dozen times inquiring about the Ocotillo plant's draft and final permits. (*See* County Brief Attachment 6; Sierra Club Reply Brief Ex. 1-3.)

The County does not explain why it failed to notify Mr. Ritchie, who was clearly the point person for reviewing the Ocotillo permit, nor why it believed that Mr. Nilles or Mr. Nelson were the proper recipients of notice related to the Ocotillo plant. Mr. Ritchie had even requested on October 22, 2014 to be added to the service list related to the Ocotillo permit. (Sierra Club Reply Brief Ex. 1.) In any case, the notice that was provided failed to meet the Board's standards "to ensure that permitting authorities rigorously adhere to procedural requirements that facilitate public participation and input during EPA permitting." *In Re: Russell City Energy Ctr.*, 14 E.A.D. 159, 174 (EAB 2008). The County could not have reasonably inferred that a generic public notice, which did not even include the name of the facility at issue anywhere in the subject line or body of the email, would have adequately alerted Sierra Club that the County was reopening the comment period for the Ocotillo permit. One of the addressees in the public notice, Derek Nelson, did not even work at Sierra Club at the time the notice was sent.

In fact, Sierra Club did not become aware that a second comment period had opened until February 17, 2016, after the public comment period had closed, at which time Mr. Ritchie promptly contacted the County. (*See* Sierra Club Reply Brief Ex. 3.) Sierra Club had assumed, incorrectly it turns out, that the County would alert Mr. Ritchie of any response to comments or revisions to the permit at the email address or physical address provided in Sierra Club's April 9,

2016 comments. The County did, ultimately, send Mr. Ritchie its response to comments along with notice of the final permit on March 23, 2016, (Pet. Ex. 2) long after the reopened public comment period had closed.

Sierra Club does not assert that the County must undertake any extraordinary actions to provide notice to the public and interested stakeholders of permitting actions. The provisions of 40 C.F.R. § 124.10 generally suffice. However, it is disingenuous for the County to claim, as it does here, that Sierra Club had abandoned its concerns with the Ocotillo project simply because Sierra Club did not refile the same comments during a second public process that it did not know existed. Therefore, to the extent there is any deficiency in the process Sierra Club followed to provide public comments on the Ocotillo permit, the Board should overlook the deficiency and reach the merits of Sierra Club's argument.

Respectfully submitted, this 13th day of May, 2016.

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STATEMENT OF COMPLIANCE

The foregoing complies with 40 C.F.R. § 124.19(d)(1)(iv) and (3). The length is 2,735 words, using the word count function in Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing SIERRA CLUB REPLY BRIEF were served through the Environmental Appeal Board's electronic filing system and by electronic mail to the following, this 13th day of May, 2016:

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Dated at Oakland, CA, this 13st day of May of 2016.

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